No. 996

In the Supreme Court of the United States

OCTOBER TERM, 1944

CHESTER G. BOLLENBACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals, as amended on petition for rehearing (R. 433–439, 450), has not yet been reported.

JURISDICTION

The decision of the circuit court of appeals affirming the judgment below upon the Government's petition for rehearing (R. 441–446) was filed January 12, 1945 (R. 450). The order denying petitioner's application for rehearing (R. 451–463) and the judgment of the circuit court of appeals were entered January 31, 1945 (R. 465–

467, 468–469). The petition for a writ of certiorari was filed February 27, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1945. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether evidence that petitioner assisted in the sale of bonds knowing them to have been stolen and transported in interstate commerce supports his conviction for conspiracy to transport stolen bonds in interstate commerce.

2. Whether the conviction should be reversed because, in response to a question by the jury asking whether petitioner could be convicted of conspiracy if he were aware that the bonds he helped dispose of were stolen, the judge charged that recent possession of stolen property raises a presumption that the possessor stole and transported the property, the evidence having established that petitioner admitted knowing that the bonds had been stolen and transported.

3. Whether the fact that the stolen bonds had been attached to proofs of claims allowed in a bankruptcy proceeding rendered them valueless and therefore insufficient to meet the jurisdictional value requirements of the National Stolen Property Act.

STATUTES INVOLVED

Section 3 of the National Stolen Property Act of May 22, 1934, as it read at the time of the offense involved in this case (c. 333, 48 Stat. 794, 18 U. S. C. 1934 ed. 415), provided:

> Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner and five others were indicted in the United States District Court for the Southern District of New York on two counts, one charging transportation in interstate commerce of stolen securities and the other a conspiracy to

transport or cause to be transported securities of more than $5,000 in value known to have been stolen from the office of the United States District Court at Minneapolis, Minnesota (R. 3–6). The trial was severed as to petitioner and he was separately tried after his codefendants had either pleaded guilty or been convicted. See *United States* v. *Turley et al.*, 135 F. 2d 867 (C. C. A. 2), certiorari denied *sub nom Burns* v. *United States*, 320 U. S. 745.

The evidence for the Government may be summarized as follows:

Twenty-five gold notes attached to proofs of claim filed in bankruptcy proceedings of the Minnesota and Ontario Company were stolen from the files of the United States District Court at Minneapolis, Minnesota (R. 9, 11–13, 16–17, 19, 27–28). Burns, a codefendant previously convicted, testified at petitioner's trial that he (Burns) was in the Court House in Minneapolis in January 1937 and that he returned to New York City on January 31, 1937 (R. 313–314). Petitioner had, for a period of time prior to 1937, used Burns' New York office as a mailing address (R. 62, 69, 311). Early in February 1937, petitioner rented space at 15 E. 40th Street, New York City, under the name of Arnold Berendson (R. 105–106). On February 1, 1937, a man describing himself as Arnold Berendson attempted to dispose of ten of the stolen notes through Hart,

Smith and Co., but the transaction was not completed for the reason that Hart, Smith and Co. became suspicious of a typewritten endorsement on its check to Berendson and stopped payment on the check (R. 80–87, 92–94).

Petitioner admittedly disposed of the other fifteen stolen notes through the defendants Turley, Blaser, and Ingalls, and he received $900 of the proceeds (R. 376–377, 393–395; see R. 207–214, 216–219, 243–247). In a statement given to an agent of the F. B. I., which petitioner signed after consultation with his counsel who was present at the time (see R. 303–304, 306), petitioner admitted that he knew that the bonds were stolen and that Burns had brought them from the West (R. 394). Petitioner had previously stolen and disposed of bonds filed in the United States District Court in Wilmington, Delaware (R. 382, 386–392).

About seven hours after the jury had retired, they reported that they were hopelessly deadlocked and the trial judge asked if any questions of law were disturbing them. In the discussion which followed, one juror asked, "Can any act of conspiracy be performed after the crime is committed?" Apparently misunderstanding the question, the judge stated that conspiracy was one of the crimes alleged. (R. 342–344.) Later the jury sent a note to the judge asking, "If the defendant were aware that the bonds which he aided in dis-

posing of were stolen does that knowledge make him guilty on the second [conspiracy] count?" (R. 347). In response, the judge instructed the jury:

> Of course if it occurred afterwards it would not make him guilty, but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen. And, just a moment—I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case.

A short time time later the jury returned a verdict of guilty on the conspiracy count (R. 348). Petitioner was sentenced to two years' imprisonment and to pay a fine of $10,000 (R. 349).

Holding that possession of stolen property would not give rise to a presumption that the property had been transported in interstate commerce, the circuit court of appeals originally ruled that the judge's charge in that respect required reversal of the conviction for the reason that there was no evidence other than the testimony of one Smith, deputy clerk of the district court in Min-

neapolis, whom the court considered untrustworthy, that petitioner knew that the notes had been transported (R. 437–439). On rehearing, when the court's attention was called to the fact that petitioner had himself admitted knowing that the bonds had come from the West (R. 443), the circuit court of appeals affirmed his conviction (R. 450, 468–469).

ARGUMENT

1. Petitioner contends (Pet. 4, 5, 9–15, 22–24) that his acquittal on the substantive count constituted a determination that he had no part in the stealing or transportation of the bonds and that he could not be convicted of a conspiracy to transport on the basis of his admitted acts in aiding in the disposition of the bonds after they had been brought to New York. The same point was raised in a somewhat different form by petitioner's co-defendant Burns on appeal and petition for certiorari to review his conviction under this indictment. Burns attacked his conviction on the conspiracy count on the ground that the overt acts charged in that count did not occur until after the notes had been brought to New York (see *United States* v. *Turley*, 135 F. 2d 867, 868, 870, certiorari denied *sub nom. Burns* v. *United States*, 320 U. S. 745. As we pointed out in opposing certiorari in that case (see Brief for the United States in Opposition, No. 156, October Term, 1943.

pp. 8–10), it is well established that a conspiracy continues until the object for which it was formed has been accomplished. Thus, in *McDonald* v. *United States,* 89 F. 2d 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697, McDonald's conviction for conspiracy to transport a kidnaped person was sustained although he did not join the conspiracy until several months after the victim had been released, and his activities consisted merely of exchanging unmarked money for the ransom money.[1] See also *Laska* v. *United States,* 82 F. 2d 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Skelly* v. *United States,* 76 F. 2d 483, 489 (C. C. A. 10), certiorari denied, 295 U. S. 757; *United States* v. *McGuire,* 64 F. 2d 485, 492 (C. C. A. 2), certiorari denied, 290 U. S. 645; *Loftus* v. *United States,* 46 F. 2d 841, 847 (C. C. A. 7); *Wilkerson* v. *United States,* 41 F. 2d 654, 655 (C. C. A. 7), certiorari denied, 282 U. S. 894; *Bellande* v. *United States,* 25 F. 2d 1, 2 (C. C. A. 5), certiorari denied, 277 U. S. 607. In the instant case the purpose of the conspiracy was not accomplished until the notes had been

[1] The amendment to the federal Kidnaping Act punishing the receipt, possession, and disposal of ransom money (49 Stat. 1099) was not in effect at the time McDonald joined in the conspiracy (see 89 F. 2d at pp. 132–133, 134–135), just as in this case the amendment to the National Stolen Property Act punishing the receipt of property known to have been stolen and transported (53 Stat. 1178) was not enacted until after the commission of the acts which form the basis of this indictment.

sold and the proceeds distributed among the conspirators.[2]

Furthermore, since the purpose of transporting the stolen notes was, unquestionably, to sell them in New York immediately, the interstate commerce continued until the notes were delivered for sale in that state. Cf. *Levi* v. *United States*, 71 F. 2d 353, 354 (C. C. A. 5); *Farris* v. *United States*, 5 F. 2d 961, 962 (C. C. A. 7). Petitioner clearly joined the conspiracy before any of the notes were delivered for sale, and he personally delivered fifteen of the notes to Blaser and Ingalls for such purpose (R. 211, 245). The evidence therefore fully supports petitioner's conviction for conspiracy to transport stolen bonds in interstate commerce, knowing them to have been stolen.[3]

2. Since petitioner was properly convicted of conspiracy to transport stolen bonds because of his aid in disposing of the bonds, we submit that the circuit court of appeals was correct in its ultimate decision (R. 450) that the trial judge's in-

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[2] *Gable* v. *United States*, 84 F. 2d 929 (C. C. A. 7), upon which petitioner relies (Pet. 5, 13, 14), is readily distinguishable, since there the circuit court of appeals held that there was no evidence that the defendant knew of the plan to procure bonds illegally or that he knew that the bonds had been so procured.

[3] Since petitioner was properly convicted of conspiracy, there is no merit in his contention (Pet. 4, 24) that his sentence should be reduced according to the provisions of the statute fixing punishment for accessories after the fact (Sec. 333 of the Criminal Code, 18 U. S. C. 551)

struction of which petitioner complains (Pet. 4, 18–22) concerning the presumption to be drawn from the possession of stolen property did not constitute reversible error. It is clear from the jury's question (*supra*, pp. 5–6) that they had already agreed that petitioner knew that the bonds had been stolen and transported. They could have reached no other conclusion in view of petitioner's direct admission of such fact (*supra*, p. 5). The jury had apparently also already agreed that petitioner was not himself guilty of transporting the bonds, since their question was directed only to the conspiracy count of the indictment. Manifestly the jury was trying to determine whether petitioner could lawfully be convicted of conspiracy although he participated in the transaction only after the bonds were brought to New York, and they apparently interpreted the judge's instruction as authorizing a conviction on such basis. Since a definite instruction to such effect would, as we have shown, have been proper, the unresponsiveness of the judge's instruction to the question asked by the jury does not, we submit, constitute a ground for reversal. That the jury did not rely upon the judge's instruction that the possession of the bonds raised an inference that the possessor had transported them and did not rely upon the testimony of the clerk of the district court that petitioner had been in the court house in Minneapolis, is shown by the

fact that they acquitted him on the substantive count.

3. The argument (Pet. 4, 15–17) that the stolen notes were not of the value of $5,000 or more for the reason that they had merged in the claims allowed in the bankruptcy proceeding is specious. The fact is, as shown by the evidence, that the bonds had a sale value in excess of $5,000, for fifteen of the twenty-five bonds were sold for $4,050 (R. 213).

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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